DEVELOPMENT & COMMERCIAL BANK BERHAD

v.

KREDIN SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' V.C. GEORGE J.
[APPLICATION FOR EXECUTION NO. 36-9-1992]
21 NOVEMBER 1994

COMPANY LAW: *Plaintiff registering prohibitory order on defendant's lands - Winding-up petition presented against defendant prior to registration - Whether prohibitory order void - Whether winding-up of a company commences upon presentation of a petition or upon pronouncement of a winding-up order - Consideration of ss.219(2) & 224 of the Companies Act 1965.*

PRACTICE & PROCEDURE: *Application by defendant for declaration that prohibitory order registered by plaintiff void - Winding-up petition presented against defendant prior to registration of prohibitory order - Effect of ss.219(2) & 224 of the Companies Act 1965 - Whether defendant's application premature.*

STATUTORY INTERPRETATION: *Companies Act 1965, s.219(2) - "shall be deemed to have commenced".*

The plaintiff had obtained a judgment against the defendant on 14 April 1989 and on or about 31 March 1992 the plaintiff registered a prohibitory order on the defendant's lands with the intention of executing the judgment obtained. The defendant applied for a declaration that the said prohibitory order was void as a winding-up petition had been presented by Bank Bumiputra Bhd, later substituted by Overseas Chinese Banking Corporation, on 14 August 1987. The defendant submitted that the effect of ss.219(2) and 224 of the Companies Act 1965 (the Act) was that the winding-up had commenced on that date and accordingly the registration of the prohibitory order after that date was void.

The issue before the Court was the effect of the words "...shall be deemed to have commenced..." in s. 219(2) of the Act.

Held:

[1] The winding-up of a company commences upon the making of the winding-up order whereupon (and only then) comes into play what has been described as a statutory fiction. The provisions of s.219(2) by which the commencement of the winding-up in fact commences on pronouncement of the winding-up order, is deemed to have commenced earlier, on the presentation of the petition.

[2] The putting into force execution after the presentation of the petition will not be void if ultimately the petition is withdrawn and struck off or is dismissed. In that situation the statutory fiction that the winding-up had commenced on presentation of the petition will not apply because in fact the winding-up never commenced. When the application was made and heard there was only a contigent future possible winding-up. The instant application was therefore obviously premature.

[Application dismissed with costs to be taxed and paid forthwith]

Cases referred to:
Pembinaan KSY Sdn. Bhd. v Lien Seng Properties Sdn. Bhd. [1991]1 MLJ 571 ***(dist)***
A.R. Goel v First National Bank AIR 1960 Punjab 476 ***(foll)***
Fleet Motor & General Insurance Co. [1984]2 ACLC 282 ***(foll)***
Re Miles Aircraft Ltd. [1948]1 All E.R.225 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 219(2), 224
Companies Act (India), s. 441(2)

For the plaintiff - N.Chandran; M/s. Adnan Sundra & Law,
For the defendants - K.S.Narayanan; M/s. Jayaraman Ong & Co,

JUDGMENT

V. C. George J:
[Enclosure (11)]
In an action against Kredin Sdn. Bhd. (Kredin) the Development Commercial Bank Bhd. (D & C Bank) had on 14 April 1989 obtained a judgment for the payment of a substantial sum of money. However earlier, on 14 August 1987, Bank Bumiputra Bhd. had caused to be presented a petition to wind up Kredin. Later Overseas Chinese Banking Corporation (OCBC) was substituted as petitioner.

On or about 31 March 1992, with the petition still pending, D & C Bank with the intention of executing the judgment obtained had registered a prohibitory order in respect of various lands the registered owner of which was Kredin.

The contention on behalf of Kredin is that the prohibitory orders are invalid and void in that the execution put in force is void as the winding-up petition had been deemed to have commenced on the presentation of the petition on 14 August 1987 prior to the putting in force of the execution.

Section 219(2) and 224 of the Companies Act 1965 relied upon are as follows:

> 219(2) In any other case the winding-up shall be deemed to have commenced at the time of the presentation of the petition for the winding-up.
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> 224. Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding-up by the Court shall be void.

It was submitted on behalf of Kredin that as the petition to wind up Kredin had been presented on 14 August 1987 the effect of s. 219(2) is that the winding-up had commenced on that date. It was further submitted on behalf of Kredin that obtaining the prohibitory order amounted to a putting in force execution after the presentation of the petition and applying s. 224 it was submitted that such execution was void. That the winding-up order had not been made, it appears to be suggested, is neither here nor there.

In *Pembinaan KSY Sdn. Bhd. v Lien Seng Properties Sdn. Bhd.* [1991]1 MLJ 571 reference was made to the effect of s. 219(2) and s. 224 in face of a pending petition to wind up. The learned Judge appeared to hold that whether the company was eventually wound up or not is not relevant where the execution put in force was after the presentation of the petition. In his judgment the effect of s. 224 was that such an execution is void.

It was submitted on behalf of D & C Bank that that opinion was made *obiter* in that the real issue in Pembinaan was not the effect of s. 219(2) and 224. I do not agree and it follows that I do not agree that that view of the learned Judge is *obiter dictum*.

However with the greatest respect to the learned Judge I find that I cannot share his opinion on the effect of the words in s. 219(2) ".... shall be deemed to have commenced." In my judgment the winding-up of a company commences upon the making of the winding-up order whereupon (and only then) comes into play what has been described as a statutory fiction, the provisions of s. 219(2) by which the commencement of the winding-up in fact commenced on pronouncement of the winding-up order is deemed to have commenced earlier, on the presentation of the petition.

In India the section equivalent to our s. 219(2) is s. 441(2) where the words used are: "..... the winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for winding-up."

In *A.R. Goel v First National Bank* AIR 1960 Punjab 476 at 477 Tek Chand J discussed the meaning to be given to "shall be deemed to commence" and concluded that it provided a statutory fiction. He said with reference of the Indian s. 441(2):

> The (Indian) Legislature has preferred to use the words "shall be deemed to commence" instead of "shall commence". This is not without significance. These words indicate the mind of the Legislature; and what is signified is, that although the winding-up of a company does not in fact commence at the time of the presentation of the petition, it nevertheless shall be taken to commence from that stage. In this context the word "deemed" means, "suppose", "considered", "construed", "thought", "taken to be", or "presumed". The word "deemed" refers to "what is supposed to be", not to "what actually is". It rather suggests that something is being assumed as true for certain purposes though really it is not so.
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> Cave J. in *R. v Norfolk County Council,* [1891] 60 LJ QB 379, said:
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> "Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing."
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> Griffith, C.J., of the High Court of Australia in *Muller v Dalgety and Company Limited* 9 CLR 696, said:
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> The word `deemed' is more commonly used for the purpose of creating more of a `statutory fiction' than is, for the purpose of extending the meaning of some term to a subject-matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced.

In *Fleet Motor & General Insurance Co.* [1984]2 ACLC 282 at 284 referring to a similar provision in New South Wales the learned Judge said:

> It has been submitted for the defendant that the use of the expression " is commenced to be wound up" and the tortured grammar which such use involves in each of these provisions indicates that the legislature intended that those words should have the technical meaning which it is said they have in company law in the case of a winding-up by order of the Court, namely that the winding-up is to be `deemed to have commenced at the time of filing of the application for the winding up'.

The learned Judge went on to say at 285:

> A compulsory winding-up does not in fact commence until the winding-up order is made by the Court. Once the order is made, the winding-up is to be "deemed to have commenced" at the earlier date. In this context the word "deemed" is used to create a statutory fiction...

In *Re Miles Aircraft Ltd.* [1948]1 All E.R.225.it was explained by Vaisey J that the deeming aspect of the matter cannot but come into play until after the winding-up order is made, tellingly pointing out that it was always possible that the petition might ultimately be withdrawn or be dismissed.

It seems to me that the putting into force execution after the presentation of the petition will not be void if ultimately the petition is withdrawn and struck off or is dismissed. In that situation the statutory fiction that the winding-up had commenced on presentation of the petition will not apply because in fact the winding-up never commenced.

All that we had here when the application was made and heard, was a contingent future possible winding-up. The instant application which in effect is for a declaration that the prohibitory order is void, is obviously premature. It has to be dismissed.

No doubt that since there is that contingent future possible winding-up, where the Court's assistance is sought, a measure of relief will in most cases be given perhaps by way of conditional orders to ensure that the *status quo* is maintained pending the outcome of the petition.

As to the instant application, enclosure (11), it is dismissed with costs to be taxed and paid forthwith.